No. 17-71353

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CAESARS ENTERTAINMENT D/B/A RIO ALL-SUITES HOTEL AND CASINO

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
CASE NO. 28-CA-060841

REPLY TO NATIONAL LABOR RELATIONS BOARD'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

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INTRODUCTION

The question presented by Rio's motion to dismiss is a simple one: Can the Board petition this court to enforce an order that resolves some, but not all, of the allegations raised in a single complaint? Because the Board's failure to resolve all the allegations of the complaint renders the order nonfinal, the answer is no. That is particularly true here, where the scope of the remedy—correction of the employee handbook—necessarily turns on adjudication of the remaining allegations.[1] Nonfinal orders with incomplete remedies are not ripe for appellate review. *See, e.g., Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408-09 (9th Cir. 1996). And an appeal or a petition from such an order should be dismissed. *Id.*

The Board attempts to sidestep that otherwise routine conclusion. Although it does not dispute the finality requirement, the Board asserts that it can manufacture jurisdiction in this court by dint of deciding a portion of the case while "severing" and remanding the rest. Opp'n at 6-8. Even though the Board is certainly free to remand claims for further adjudication, its made-up severance procedure—described nowhere in the Board's rules or regulations—cannot circumvent the bedrock requirement of finality. The National Labor Relations Act (the "Act"), the sole source of this court's jurisdiction here, requires an application from a final order such that "jurisdiction of the court shall be exclusive." 29

[1] Considerable resources are needed to implement a notice-posting—whether it consists of a completely new handbook, handbook inserts, or adhesive backing.

U.S.C. § 160(e) (2016). That exclusive jurisdiction is just what the Board now asks this court to overlook by requiring Rio to revise its employee handbook only to revise it again—simply because the Board could not wait to seek enforcement of a final order.

ARGUMENT

The Board does not dispute that Section 10(e) of the Act requires a final order. Yet without referring to a single rule or regulation (or even any sub-regulatory agency guidance), the Board insists it can vest this court with jurisdiction over an otherwise nonfinal order by unqualifiedly "severing" unresolved claims from the same complaint and remanding them for further adjudication. Opp'n at 6-8. Although the Board has wide discretion to resolve or remand claims as it sees fit, it cannot create jurisdiction in the federal courts of appeals without a statutory basis. It is up to this court to determine the finality of the Board's order for jurisdictional purposes, and an order that fails to resolve all the allegations of a single complaint—particularly where, as here, the scope of the remedy depends on resolution of the remaining claims—is not final. *See Cordoza v. Pac. States Steel Corp.*, 320 F.3d 989, 996-98 & n.3 (9th Cir. 2003) (holding post-judgment order in analogous consent decree proceedings was nonfinal for jurisdiction purposes).

This court has but one source of jurisdiction over applications for enforcement of Board orders: Section 10(e) of the Act. Throughout its 80+ year

history, the Act has been intended to give federal courts "the exclusive method of review in one proceeding after a final order is made." H.R. Rep. 1147, 74th Cong., 1st Sess., p. 24 (1934). In its opposition brief, the Board states that "it is well-established in Board proceedings that individual unfair-labor-practice allegations may be severed," which is what it did in this case. Opp'n at 6. In support, the Board cites "drive-by" jurisdiction rulings that merely decided appeals without addressing finality for purposes of appellate jurisdiction. But whatever the Board's authority to "sever" unresolved claims, the Board cites no basis whatsoever—not a rule, regulation, or even opinion letter—to suggest that any so-called severance has the talismanic effect of converting a nonfinal order into a final one. The Board cannot augment the jurisdiction of the federal court of appeal without more.

Not only would such jurisdictional manipulation be legally improper, but it would have significant practical consequences. In addition to depriving regulated entities of their choice of venue (*see* Mot. 11-13), it could deprive them of the opportunity to obtain appellate review of the Board's findings altogether. The upshot of the Board's position is that the clock—for purposes of laches—for filing a petition for review (like an application for enforcement) runs from the date of the order, *even when that order did not resolve all the claims*. *See NLRB v. Searle Auto Glass, Inc.*, 762 F.2d 769, 772-73 (9th Cir. 1985) (applying temporal limitation to application for enforcement). Therefore, respondents that await the outcome of remand proceedings so they can appeal all the issues from a final order

at once would be untimely as to the previously resolved claims.[2] That jarring result is precisely why the Board cannot simply dictate the finality of its order by whim.

The Board seeks to distract from that lack of authority by pointing to appealed-from decisions in which federal district courts had severed misjoined claims from lawsuits under Rule 21 of the Federal Rules of Civil Procedure. Opp'n at 6. But whatever the effect of Rule 21's operation on conferring finality in that context, it is inapplicable to Board proceedings.

The Board's reliance on misjoinder cases fails for another reason: Had this case originated in federal district court, it would not have been appropriate to sever the underlying allegations as misjoined. Under Rule 20 of the Federal Rules of Civil Procedure, claims joinder in a single action is appropriate when (1) the claims arise from the same transaction or occurrence, or series of transactions or occurrences and (2) the claims share a common question of law or fact. *See Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997). The purpose of these requirements is "to promote judicial economy, and reduce inconvenience, delay, and added expense." *Id*. at 1351. It can scarcely be doubted that an attack on a

[2] The Board waited nearly two years before filing its application. And that delay caused Rio to reasonably expect that the Board too was waiting for a final order before seeking judicial enforcement. Although the Board's Regional Director did notify Rio approximately two weeks before seeking enforcement, the Company wrote back, asking for the Board's legal basis for seeking premature enforcement. *See* Exhibit A (attached).

single handbook based on related allegations and seeking revision or reissuance of the same handbook arises from the same transaction and a common question of law, the litigation of which in a single case reduces the added expense of duplicative handbook revisions.

Moreover, as Rio noted in its motion (Mot. at 9-10), the facts here do not support a Federal Rule of Civil Procedure 54(b)-type certification. *See United States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 798 (9th Cir. 2017) (holding post-judgment order was not appealable "[b]ecause the district court failed to find there was no need for further delay"). In its applied-from decision, the Board ordered the administrative law judge to whom the decision was assigned to "prepare a supplemental decision." (Dkt. 1-5 at 14.) "Supplemental" suggests that the decision is still part of the same proceeding.[3] More fundamentally, the Board itself has not promulgated any Rule 54(b)-type procedure by which parties or courts can evaluate finality when less than all claims have been resolved.

But any comparisons to the Federal Rules of Civil Procedure aside, the law confers exclusive jurisdiction on federal courts of appeals over the case and the remedy sought if *and only if* the Board issues a final order. Where, as here, the Board fails to resolve all the claims within a single complaint, and where, as here,

[3] The Board does not cite a single finding in its applied-from order that the remanded allegations were "discrete" for purposes of jurisdiction. More importantly, the administrative law judge's "supplemental" order retains the same case number as the original complaint and the applied-from order.

the remedy is intertwined with those unresolved claims, no final order exists: exactly what sort of new handbook Rio must issue which has yet to be decided within the Board's own administrative channels. The Board's "severance" of the still-pending claims cannot circumvent that finality requirement.

CONCLUSION

The Board's application for enforcement should be dismissed for all the reasons set forth in this reply and in the Respondent's motion to dismiss.

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Respectfully submitted,

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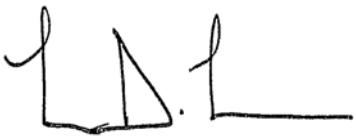

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